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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. VICTOR JAVIER GONZALEZ, Defendant and Appellant.	H045178 (Monterey County Super. Ct. No. 17CR000057)

I. INTRODUCTION

Defendant Victor Javier Gonzalez pleaded no contest to possession for sale of cocaine (Health & Saf. Code, § 11351) and admitted that he had served three prison prior terms (Pen. Code, § 667.5, subd. (b))[1]. The trial court sentenced defendant to six years in county jail, suspending three years of his sentence and ordering a three-year period of mandatory supervision upon his release. (See § 1170, subd. (h)(5)(B).)

On appeal, defendant challenges, as overbroad, two conditions of mandatory supervision that require him to submit his electronic devices for search by the probation officer or a peace officer.[2] Defendant also challenges, as overbroad, a condition

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant describes the two electronic search conditions as one condition, but the record indicates that two separate conditions were imposed.

prohibiting him from obtaining any new tattoos. For reasons we shall explain, we will affirm the judgment.

II. BACKGROUND

A. Statement of Facts[3]

At approximately 10:20 p.m. on June 16, 2017, officers contacted defendant at a nightclub, informed defendant that he was on probation with a search and seizure clause, and requested defendant exit the nightclub so he could be searched. Defendant refused, so officers physically removed him. Once outside, defendant took a plastic baggie containing cocaine from his pocket and threw it on the ground, dragging his foot over it and causing the baggie to tear. Defendant struggled with the officers, and he kicked one officer in the chest while being placed in the patrol vehicle. Officers searched defendant and his vehicle, recovering a total of 13.2 grams of cocaine and $1,102.00 in cash.

According to jail records, defendant admitted to being a Norteño gang member and was housed in an active Norteño gang unit.[4] While in Monterey County Jail, defendant received a Disciplinary Action Report (DAR) for "[p]ossession of tattoo equipment, tattooing self or others."

B. Procedural History

On August 3, 2017, defendant was charged with possession for sale of cocaine (Health & Saf. Code, § 11351; count 1), destroying evidence (§ 135; count 2), battery on a peace officer (§ 243, subd. (b); count 3), and resisting a peace officer (§ 148, subd. (a)(1); count 4). The information also alleged a prior felony drug sale conviction as to count 1 (Health & Saf. Code, § 11370.2, subd. (a)) and that defendant had served three prior prison terms (§ 667.5, subd. (b)).

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[3] As defendant was convicted by plea, the summary of his offenses is taken from the probation report.

[4] At the sentencing hearing, defendant denied that he had admitted to being a Norteño gang member.

On August 23, 2017, defendant pleaded no contest to possession for sale of cocaine (count 1). He also admitted the prior prison term allegations. The probation officer recommended that the trial court impose a number of conditions of mandatory supervision, including the three conditions defendant challenges on appeal.

The first challenged condition provides: "Submit all electronic devices under your control to a search by the Probation Officer or a peace officer, of any text messages, voicemail messages, call logs, photographs, email accounts and social media accounts, with or without reasonable or probable cause or the benefit of a search warrant, at any time of the day or night and provide the probation or peace officer with any passwords necessary to access the information specified, and you will not change or add any email address or passwords without prior permission of your Probation officer."

The second challenged condition provides: "You must provide any probation officer or other peace officer access to any cell phone device or other electronic device for the purpose of searching social media accounts and applications, photographs, video recordings, email messages, text messages and voice messages. Such access includes providing all passwords to any social media accounts and applications upon request, and you shall submit such accounts and applications to search at any time without a warrant by any probation officer or any other peace officer."[5]

[5] The California Supreme Court is currently considering a challenge to an electronic devices search condition in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923 (*Ricardo P.*). As reflected on the docket in *Ricardo P.*, the issue presented is as follows: "Did the trial court err by imposing an 'electronic search condition' on the juvenile as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375 because it would facilitate the juvenile's supervision?" (<http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2126967&doc_no=S230923&request_token=NiIwLSIkXkw4WzApSCNNTEJIQFQ0UDxTICJeIzhTQCAgCg%3D%3D> [as of July 10, 2018].)

The third challenged condition provides: "Do not obtain any new tattooing upon your person while on [mandatory] supervision. You shall permit photographing of any tattoos on your person by law enforcement."

On October 6, 2017, the trial court imposed the conditions as recommended and sentenced defendant to six years in county jail pursuant to section 1170, subdivision (h), suspending three years and imposing a three-year period of mandatory supervision upon his release.

III. DISCUSSION

Defendant contends that the conditions of mandatory supervision requiring him to submit his electronic devices for search and prohibiting him from obtaining any new tattoos are unconstitutionally overbroad.

A. General Principles Regarding Mandatory Supervision

Although the parties refer to the electronic devices search conditions and the tattoo prohibition condition as "probation conditions," the challenged conditions relate to his three-year period of mandatory supervision. (See § 1170, subd. (h)(5)(B).) We begin by reviewing general principles regarding mandatory supervision.

When a defendant is on mandatory supervision, he or she "shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." (§ 1170, subd. (h)(5)(B).) Although mandatory supervision has been characterized as "akin to probation" (*People v. Griffis* (2013) 212 Cal.App.4th 956, 963, fn. 2), courts have also observed that mandatory supervision is in some respects "more similar to parole than probation" (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423; accord, *People v. Martinez* (2014) 226 Cal.App.4th 759, 763 (*Martinez*)). Mandatory supervision conditions have therefore been analyzed "under standards analogous to the conditions or parallel to those applied to terms of parole." (*Martinez, supra*, at p. 763.)

"The fundamental goals of parole are ' "to help individuals reintegrate into society as constructive individuals" [citation], " 'to end criminal careers through the rehabilitation of those convicted of crime' " [citation] and to [help them] become self-supporting.' [Citation.] In furtherance of these goals, '[t]he state may impose any condition reasonably related to parole supervision.' [Citation.] These conditions 'must be reasonably related to the compelling state interest of fostering a law-abiding lifestyle in the parolee.' [Citation.]" (*Martinez, supra*, 226 Cal.App.4th at p. 763.)

B. Standard of Review

We review constitutional challenges to conditions of mandatory supervision de novo. (*Martinez, supra*, 226 Cal.App.4th at pp. 765-766*; In re Sheena K.* (2007) 40 Cal.4th 875, 888 (*Sheena K.*) [whether a probation condition is unconstitutionally vague or overbroad is a question of law, which we review de novo].)

C. Electronic Search Conditions

Defendant contends the electronic devices search conditions are overbroad because the conditions "unnecessarily implicate[] his individual privacy rights" since there is no evidence he used electronics to commit criminal activity.[6] Defendant requests those conditions be stricken or modified. The Attorney General argues that neither condition is overbroad because the conditions are limited to electronic devices under defendant's control.

In the context of probation conditions, the California Supreme Court has stated that a "condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

[6] Defendant objected to the electronic devices search conditions as overbroad at the sentencing hearing.

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*United States v. Knights* (2001) 534 U.S. 112, 118-119 (*Knights*).) A person's status as a probationer subject to a search condition informs both sides of that balance because probationers enjoy a lesser expectation of privacy than the general public. (*Id*. at p. 119.)

In *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*), this court rejected an overbreadth argument where the challenged probation conditions required the defendant to "(1) 'provide all passwords to any electronic devices, including cellular phones, computers or notepads, within [his] custody or control, and submit such devices to search at any time without a warrant by any peace officer' and (2) 'provide all passwords to any social media sites, . . . and to submit those sites to search at any time without a warrant by any peace officer.' " (*Id*. at p. 1172.) The defendant in *Ebertowski*, a member of a criminal street gang, had used social media to promote his gang. The defendant had also physically resisted and threatened an officer. This court rejected the defendant's claim that the challenged probation condition was "not narrowly tailored to [its] purpose so as to limit [its] impact on his constitutional rights to privacy, speech, and association" and concluded that the state's interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the condition, outweighed the minimal invasion of his privacy. (*Id*. at p. 1175.) This court noted that the defendant's "involvement with his gang has produced a man willing to threaten and physically resist armed police officers" and concluded that "[t]he minimal invasion of his privacy that is involved in the probation officer monitoring defendant's use of his devices and his social media accounts while defendant is on probation is outweighed by the state's interest in protecting the public from a dangerous criminal who has been granted the privilege of probation." (*Id*. at p. 1176.)

In asserting that the electronic devices search conditions significantly impact his privacy rights, defendant relies on the United States Supreme Court's decision in *Riley v. California* (2014) 573 U.S. ___ [134 S.Ct. 2473] (*Riley*). In *Riley*, the court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley*, *supra*, at p. ___ [134 S.Ct. at pp. 2493-2494].) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id*. at p. ___ [134 S.Ct. at p. 2489].) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id*. at p. ___ [134 S.Ct. at p. 2493].)

Riley is inapposite since it arose in a different Fourth Amendment context. *Riley* involved the scope of a warrantless search incident to arrest of a person who had not been found to have committed a crime beyond a reasonable doubt and who was not on supervised release. (*Riley*, *supra*, 573 U.S. at p. ____ [134 S.Ct. at pp. 2480-2481].) The balancing of the state's interests and the defendant's privacy interests is very different in this case, which involves the mandatory supervision of a convicted felon with a prior conviction for selling narcotics. Moreover, *Riley* did not consider the constitutionality of conditions of probation, parole, or mandatory supervision. Persons on supervised release do not enjoy the absolute liberty to which every citizen is entitled and the court may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. (*Knights*, *supra*, 534 U.S. at p. 119 [probationers]; see also *In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted April 12, 2017, S240222 [*Riley* involved a person's "preconviction expectation of privacy"].)

Defendant also relies on this court's decision in *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*). In *Appleton*, the defendant pleaded no contest to false imprisonment by means of deceit. (*Id*. at p. 720.) The trial court granted probation and

imposed a condition making the defendant's computers and electronic devices " 'subject to forensic analysis search for material prohibited by law.' " (*Id*. at p. 721.) The only connection between the offense and electronic devices in *Appleton* was that the defendant met the minor victim on social media several months before the crime occurred. (*Id*. at pp. 719-720.) On appeal, the defendant challenged the search condition as both unreasonable and overbroad. (*Id*. at pp. 723-724.) The *Appleton* panel concluded that although the challenged condition was reasonable, it was unconstitutionally overbroad, and the panel remanded the matter to the trial court to "consider fashioning an alternative probation condition." (*Id*. at p. 729.) Relying on *Riley*, the *Appleton* panel held that the condition was overbroad because it "would allow for searches of vast amounts of personal information" (*Appleton*, *supra*, at p. 727) that "could potentially expose a large volume of documents or data, much of which may have nothing to do with illegal activity," including "for example, medical records, financial records, personal diaries, and intimate correspondence with family and friends" (*id*. at p. 725). The *Appleton* panel concluded that "the state's interest here—monitoring whether defendant uses social media to contact minors for unlawful purposes—could be served through narrower means," such as by imposing "the narrower condition approved in *Ebertowski*, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring." (*Id*. at p. 727, fn. omitted.)

Defendant urges us to strike the challenged conditions or follow *Appleton* and remand to the trial court to fashion more narrowly tailored conditions of mandatory supervision related to his electronic devices. Echoing concerns expressed in *Riley*, defendant argues that a cell phone may contain data dating far back in time and can implicate data that is not stored on the device itself that may be accessed via cloud computing. (See e.g., *Riley*, *supra*, 573 U.S. at p. ___ [134 S.Ct. at p. 2491].)

Here, as the Attorney General notes, the electronic devices search conditions properly serve the state's interest in preventing defendant from using electronic devices

to engage in criminal activity such as the sale of narcotics or gang activity. Given defendant's physical resistance to the probation search and his use of violence towards police officers, "[t]he minimal invasion of his privacy" associated with monitoring his electronic devices and social media accounts while he is on mandatory supervision "is outweighed by the state's interest in protecting the public from a dangerous criminal who has been granted the privilege of [mandatory supervision]." (See *Ebertowski*, *supra*, 228 Cal.App.4th at p. 1176.) Moreover, we note that the challenged conditions do restrict the permitted searches of defendant's electronic devices, by specifying the type of applications that may be searched and the purposes for which searches may be conducted. Although defendant generally argues the conditions are overbroad, he does not explain how they should be further circumscribed in a way that would still serve the state interest identified above. We conclude the electronic devices search condition is not overbroad.

D. Tattoo Prohibition Condition

Defendant contends that the condition preventing him from obtaining "any new tattooing" is unconstitutionally overbroad in violation of his First Amendment right to freedom of expression. Defendant requests the condition be modified to prohibit him from obtaining any new "gang-related" tattoos.[7] The Attorney General argues that the condition is a valid content-neutral restriction.

Defendant acknowledges that conditions prohibiting tattoos for gang members have been upheld in juvenile cases. (E.g., *In re Antonio C.* (2000) 83 Cal.App.4th 1029 (*Antonio C.*); *In re Victor L.* (2010) 182 Cal.App.4th 902 (*Victor L.*).) He argues that because he is an adult, the rationale used by those courts does not apply to him. The Attorney General contends that that because defendant is on mandatory supervision, a "unique form of post-incarceration supervision akin to the heightened supervision

[7] At the sentencing hearing, defendant objected to the tattoo condition by asking the trial court to add "the term 'gang' " so as "to not offend his First Amendment rights."

permitted for juvenile probationers and parolees," the analysis in *Antonio C.* and *Victor L.* supports the tattoo prohibition in this case.

In *Antonio C.*, the appellate court rejected a First Amendment challenge to a condition prohibiting the minor from acquiring any new tattoos: "Assuming, without deciding, that tattoos and related skin markings constitute speech under the First Amendment [citation], the probation condition does not unduly burden [the minor's] free speech rights. The United States Supreme Court has long held that while nonverbal expressive activity cannot be banned because of the ideas it expresses, it can be banned because of the action it entails. . . . Here, the probation condition, which is content neutral, temporarily prohibits [the minor] from self-expression through permanent skin disfigurement. Its focus is the manner in which the message is conveyed, not the message itself. As such, it constitutes a reasonable manner restriction on [the minor's] free speech rights. [Citation.]" (*Antonio C.*, *supra*, 83 Cal.App.4th at p. 1035.)

The defendant in *Victor L.* was over the age of 18 when he was placed on probation, and the appellate court implicitly rejected the distinction between minors and adults. (*Victor L.*, *supra*, 182 Cal.App.4th at p. 928.) The court agreed with the constitutional analysis of *Antonio C.* and concluded that "the prohibition on acquiring tattoos while on juvenile probation is a proper condition for gang members or those at risk of becoming gang members, regardless of their age, so long as they remain under the juvenile court's jurisdiction." (*Victor L.*, *supra*, at p. 928.) "Just because it is lawful for an 18 year old to get a tattoo does not mean it is wise." (*Id*. at p. 929.) The court noted that "gang tattoos may employ obscure symbols not readily recognized or catalogued as gang tattoos" and explained that "a complete ban on new tattoos enhances the enforceability of the condition." (*Id*. at p. 930.)

Although defendant is not a minor, based on the rationale of *Antonio C.* and *Victor L.*, we conclude that the prohibition on acquiring tattoos while on mandatory

supervision is a proper condition in light of the evidence of defendant's gang membership.

IV. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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